

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 CHARLES MCNEES, DAVID
4 BRESSELSMITH, and TONEY A. WHITE,

5 Plaintiffs

6 v.

7 RONALD OLIVER, et al.,

8 Defendants

Case No.: 2:23-cv-01121-APG-DJA

**Order Dismissing McNees and
Bresselsmith From Action**

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10 Pro se plaintiffs Charles McNees, David Bresselsmith, and Toney A. White bring this
11 civil-rights action under 42 U.S.C. § 1983 to redress constitutional violations that they claim they
12 suffered while incarcerated. ECF No. 1-1. On July 26, 2023, the magistrate judge ordered
13 McNees, Bresselsmith, and White to each file fully complete applications to proceed *in forma*
14 *pauperis* or pay the full \$402 filing fee on or before September 22, 2023. ECF No. 6. The
15 magistrate judge warned them that the action could be dismissed if they failed to each file fully
16 complete applications to proceed *in forma pauperis* with all three documents or pay the full \$402
17 filing fee for a civil action by that deadline. *Id.* at 3. After White was the only plaintiff who
18 filed a fully complete application to proceed *in forma pauperis*, the magistrate judge gave
19 McNees and Bresselsmith until October 25, 2023, to file fully complete applications or
20 alternatively stated that the plaintiffs could pay the full \$402 filing fee for this case. ECF Nos. 7,
21 15. That deadline expired and McNees and Bresselsmith did not file fully complete applications
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1 to proceed *in forma pauperis*. The three plaintiffs also did not pay the full \$402 filing fee or
 2 otherwise respond. I now dismiss McNees and Bresselsmith from this action.¹

3 **I. Discussion**

4 District courts have the inherent power to control their dockets and “[i]n the exercise of
 5 that power, they may impose sanctions including, where appropriate . . . dismissal” of a case.
 6 *Thompson v. Hous. Auth. of City of Los Angeles*, 782 F.2d 829, 831 (9th Cir. 1986). A court may
 7 dismiss an action based on a party’s failure to obey a court order or comply with local rules. *See*
 8 *Carey v. King*, 856 F.2d 1439, 1440-41 (9th Cir. 1988) (affirming dismissal for failure to comply
 9 with local rule requiring *pro se* plaintiffs to keep court apprised of address); *Malone v. U.S.*
 10 *Postal Service*, 833 F.2d 128, 130 (9th Cir. 1987) (dismissal for failure to comply with court
 11 order). In determining whether to dismiss an action on one of these grounds, I must consider: (1)
 12 the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its
 13 docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of
 14 cases on their merits; and (5) the availability of less drastic alternatives. *See In re*
 15 *Phenylpropanolamine Prod. Liab. Litig.*, 460 F.3d 1217, 1226 (9th Cir. 2006) (quoting *Malone*
 16 *v. U.S. Postal Serv.*, 833 F.2d 128, 130 (9th Cir. 1987)).

17 The first two factors, the public’s interest in expeditiously resolving this litigation and the
 18 court’s interest in managing its docket, weigh in favor of dismissal of McNees and
 19 Bresselsmith’s claims. The third factor, risk of prejudice to defendants, also weighs in favor of
 20 dismissal because a presumption of injury arises from the occurrence of unreasonable delay in
 21 filing a pleading ordered by the court or prosecuting an action. *See Anderson v. Air West*, 542

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 23 ¹ I will address White’s ability to proceed with this action in a separate order.

1 F.2d 522, 524 (9th Cir. 1976). The fourth factor—the public policy favoring disposition of cases
2 on their merits—is greatly outweighed by the factors favoring dismissal.

3 The fifth factor requires me to consider whether less drastic alternatives can be used to
4 correct the party’s failure that brought about the court’s need to consider dismissal. *See Yourish*
5 *v. Cal. Amplifier*, 191 F.3d 983, 992 (9th Cir. 1999) (explaining that considering less drastic
6 alternatives *before* the party has disobeyed a court order does not satisfy this factor); *accord*
7 *Pagtalunan v. Galaza*, 291 F.3d 639, 643 & n.4 (9th Cir. 2002) (explaining that “the persuasive
8 force of” earlier Ninth Circuit cases that “implicitly accepted pursuit of less drastic alternatives
9 prior to disobedience of the court’s order as satisfying this element[,]” *i.e.*, like the “initial
10 granting of leave to amend coupled with the warning of dismissal for failure to comply[,]” have
11 been “eroded” by *Yourish*). Courts “need not exhaust every sanction short of dismissal before
12 finally dismissing a case, but must explore possible and meaningful alternatives.” *Henderson v.*
13 *Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986). Because this action cannot realistically proceed
14 until and unless McNees and Bresselsmith each file fully complete applications to proceed *in*
15 *forma pauperis* or all three plaintiffs pay the \$402 filing fee for a civil action, the only alternative
16 is to enter a third order setting another deadline. But the reality of repeating two ignored orders is
17 that it often only delays the inevitable and squanders the court’s finite resources. The
18 circumstances here do not indicate that this case will be an exception: there is no hint that
19 McNees and Bresselsmith need additional time or evidence that they did not receive the court’s
20 order. Setting a third deadline is not a meaningful alternative given these circumstances. So the
21 fifth factor favors dismissal of McNees and Bresselsmith from this case.

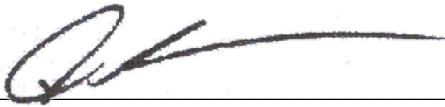
22 **II. Conclusion**

23 Having thoroughly considered these dismissal factors, I find that they weigh in favor of
dismissal of McNees and Bresselsmith. It is therefore ordered that McNees and Bresselsmith are

1 dismissed from this action without prejudice based on their failure to each file fully complete
2 applications to proceed *in forma pauperis* or pay the full \$402 filing fee in compliance with the
3 magistrate judge's July 26, 2023, and September 25, 2023, orders. Neither McNees nor
4 Bresselsmith may file any other documents in this case. If McNees or Bresselsmith wish to
5 pursue their claims, they must file individual complaints in a new case and satisfy the matter of
6 the filing fee.

7 The Clerk of the Court is directed to send McNees, Bresselsmith, and White each a copy
8 of this order.

9 Dated: November 7, 2023

10 
11 U.S. District Judge